

**Braun Electric Company, Inc. and International
Brotherhood of Electrical Workers, Local
Union No. 428, AFL-CIO. Case 31-CA-20842**

July 21, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

Upon a charge and amended charge filed October 18 and December 6, 1994, by the Union, the Regional Director for Region 31 issued a complaint June 29, 1995, against the Respondent, alleging that the Respondent engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and the Charging Party. On September 27, 1995, the Regional Director issued an order postponing hearing indefinitely, which was served on the Respondent and the Charging Party.

On October 19, 1995, on the basis of an all-party stipulation, the parties filed with the Board a motion to transfer the instant proceeding to the Board without a hearing before an administrative law judge and submitted a proposed record consisting of the formal papers and parties' stipulation of facts with attached exhibits. On November 28, 1995, the Acting Executive Secretary of the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs.

The Board has considered the stipulation, the briefs, and the entire record of this proceeding, and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation with an office and place of business in Taft, California, is engaged in the building and construction industry performing electrical engineering, design, and construction work. The Respondent annually purchases and receives goods or services valued in excess of \$50,000 from other enterprises located within the State of California, and each enterprise receives these goods in substantially the same form directly from points outside the State of California, and the Respondent annually derives gross revenues in excess of \$500,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue is whether the Respondent violated Section 8(a)(1) of the Act by threatening to initiate, initiating, and maintaining a lawsuit against Union Business Representative Danny Kane for videotaping Respondent President John Braun's encounter with Kane and others who were attempting to submit employment applications to the Respondent and for filing an unfair labor practice charge.

A. Facts

In 1989 the Union adopted a "salting resolution," and since then the Union has engaged in "salting." The purpose of "salting" is to organize unorganized employers.

On March 16, 1994, pursuant to the Union's "salting" program, Kane, a full-time business representative of the Union, and several other individuals went to the Respondent's office to submit employment applications. John Braun refused to accept the applications because no positions were available and the Respondent's practice was to accept applications only if a position was available. Kane videotaped the encounter between John Braun and the applicants.

On May 5, 1994, the Union filed an unfair labor practice charge, designated Case 31-CA-20561, alleging that the Respondent had violated the Act by refusing to accept the applications. On August 30, 1994, the Regional Director dismissed the charge. On September 6, 1994, the Union filed an appeal of the dismissal.

On October 13, 1994, Kane received a letter¹ on the Respondent's stationery, signed "John A. Braun, President." The letter stated in pertinent part:

As you were the individual operating the videotape recorder [in March] 1994 without my prior consent, I am making a demand on you for five thousand dollars (\$5,000.00). You are liable under California law for civil penalties under the Privacy Act, California Penal Code [sec.] 637.2. If this demand is not satisfied by November 1, 1994, a claim will be filed at [the small claims court].

In November 1994 Kane received a notice that he was being sued in the case of *Braun v. Kane, IBEW Local 428*, Small Claims Case No. SJ3614. On December 7, 1994, the small claims court decided in John Braun's favor.

Kane and the Union appealed. On March 8, 1995, the superior court, after a trial de novo, issued a judgment "in favor of Defendants Danny Kane and [the Union] . . . Plaintiff John A. Braun to take nothing by reason of his complaint."

¹ The state small claims procedures require that a plaintiff make a demand before filing a claim.

On April 25, 1995, the Office of Appeals sustained the Regional Director's dismissal of the charge in Case 31-CA-20561.

B. *The Parties' Contentions*

The General Counsel contends that the Respondent sent the demand letter and filed the lawsuit in retaliation for protected activity. The Respondent contends that John Braun was acting as an individual, not as the Respondent's agent, in filing the lawsuit. Alternatively, the Respondent argues that the Board cannot find the lawsuit was filed for a retaliatory reason because the small claims court found the suit had merit. Finally, the Respondent contends that even assuming *arguendo* it is responsible for Braun's conduct and that Braun filed the lawsuit to retaliate against the Union, Braun was not retaliating against any activity protected by the Act.

C. *Analysis*

The legal principles governing this case are well settled. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court held that establishing a lack of reasonable basis in fact or law and a retaliatory motive are prerequisites to *enjoining* prosecution of a state court lawsuit. The Court also held, however, that where, as here, the lawsuit has resulted in a judgment adverse to the plaintiff, the Board may proceed to consider whether the lawsuit was filed with retaliatory intent, and if such intent is present, find a violation of the Act and order appropriate relief. *Id.* at 747. As the Board has explained:

[We have] consistently interpreted *Bill Johnson's Restaurants* to hold that if the plaintiff's lawsuit has been finally adjudicated and the plaintiff has not prevailed, its lawsuit is deemed meritless, and the Board's inquiry, for purposes of resolving the unfair labor practice issue, proceeds to resolving whether the respondent/plaintiff acted with a retaliatory motive in filing the lawsuit.

Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199, 1200 (1992), *enf. denied* on other grounds 15 F.3d 677 (7th Cir. 1994).

Having set forth the analytical framework, we now turn to the issues before us.

1. *Agency*

Although the Respondent stipulated that John Braun is a supervisor and has acted as an agent for the Respondent, the stipulation also states that the Respondent "does not admit that Braun was acting as an agent" in threatening to initiate, initiating, and maintaining the small claims court suit. The Respondent argues in its brief that John Braun was seeking "personal damages arising out of an invasion of privacy,"

these actions were not within his "duties on behalf of Respondent," and therefore the Respondent cannot be found liable for his actions. We do not agree with the Respondent's contention.

In *Nemacolin Country Club*, 291 NLRB 456, 458 (1988), *enfd.* 879 F.2d 858 (3d Cir. 1989), the Board found that the respondent, through the president and a member of the board of governors, committed a number of 8(a)(1) violations, rejecting the respondent's contention that the president and the board member were not authorized to act on their own.

The Board held that a party may be bound by conduct of those it holds out to speak and act for it, even though there is no proof that specific acts were actually authorized or subsequently ratified. In finding the president an agent, the Board focused on an antiunion letter from him to employees. The Board concluded that the fact that he was the respondent's president and had signed the letter on the respondent's stationery clothed him with apparent authority sufficient to bind the respondent by his conduct. Regarding the board member, the Board, noting that it often finds elected or appointed officials of an organization to be agents of that organization, quoted in *Nemacolin*, *supra* at 459, the following from *Electrical Workers IBEW Local 453 (National Electrical)*, 258 NLRB 1427, 1428 (1981):

While the holding of elective office does not mandate a finding of agency *per se*, such status is persuasive and substantial evidence which will be decisive absent compelling contrary evidence.

John Braun wrote the demand letter on the Respondent's stationery and signed the letter "John A. Braun, President." As in *National Electrical*, *supra*, this is "persuasive and substantial evidence" that John Braun was acting as the Respondent's agent in sending the demand letter and pursuing the small claims court suit,² unless the stipulation contains "compelling contrary evidence."

We find no such compelling contrary evidence here. The Respondent's claim that John Braun was not acting within his "duties on behalf of Respondent" is unconvincing. The demand letter and the lawsuit were directly related to an encounter concerning employment that took place on company property, and the Respondent concedes, as it must, that John Braun acted

² The Respondent, citing *West Covina Disposal*, 315 NLRB 47, 61 (1994), argues that there has been no manifestation that John Braun was acting on its behalf in bringing the lawsuit. In *West Covina Disposal*, the Board found that the respondent employer had done nothing that would reasonably lead employees to believe another employer's supervisors were authorized to act for the respondent. Here, as explained above, John Braun's status as president and his use of company stationery are sufficient reason for believing John Braun was authorized to act. And, as mentioned below, the fact that the acts at issue arose from an employment encounter provides further reason for believing that he was authorized to act.

within the scope of the president's duties during that encounter. Under the circumstances, we find that John Braun was acting as the Respondent's agent when he sent the demand letter on the Respondent's letterhead, signed it as the Respondent's president, and pursued action consistent with the letter in the small claims court suit.

2. Protected activity

Before reaching whether the Respondent's lawsuit was retaliatory, we must decide whether any conduct in which Kane and the other individuals engaged—visiting the Company's office to present employment applications, videotaping the employment application encounter, and filing an unfair labor practice charge—constitutes protected activity.

Job applicants, including paid union organizers such as Kane, are considered employees under Section 2(3) of our Act, and are therefore entitled to the Act's protection. See *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995). Thus, Kane was not deprived of protection under the Act while visiting the Company's office to present an employment application simply because he was a paid union organizer.

Kane and the other individuals who attempted to submit employment applications to John Braun were doing so pursuant to the Union's "salting" program, i.e., they were attempting to organize the Respondent, and thus were engaged in protected Section 7 activity.³ Kane's videotaping was a way to document what occurred during the employment application encounter and did not cause the activity to lose the protection of the Act.⁴

Thereafter, the Union filed an unfair labor practice charge alleging that the Respondent's refusal to accept the applications was unlawful. When the Regional Director dismissed the charge, the Union filed an appeal. There can be no doubt that this conduct was protected by the Act as well. As the Supreme Court stated in *Bill Johnson's*, the rights secured by Section 7 include "the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes." 461 U.S. at 740. See

³The Respondent admits that Kane's "purpose in applying for a job . . . was clearly in furtherance of the organizational objective[s] of the 'Salting Resolution.'" We find nothing in the stipulation nor the Respondent's brief that would support finding that Kane's and the Union's activities were undertaken in bad faith and therefore unprotected.

The Respondent has not shown that the videotaping was illegal under California law. Accordingly, the Board is not precluded from finding it to be related to the Union's protected organizing activity.

⁴In making this finding, we do not pass on whether the videotaping itself was protected activity. The question of whether the Respondent could lawfully have required the union group to either turn off the video recorder or leave the premises is not presented in this case. In any event, the record does not reflect that the Respondent made such a request.

also *Roadway Express*, 239 NLRB 653 (1978) (filing of a charge with the Board is protected activity). Accordingly, we find that the conduct engaged in by Kane and the Union here constituted protected activity.

3. Retaliatory motive

In a discussion with the small claims court judge about his lawsuit, John Braun made the following remarks about the Union:

The union uses videotaping to bring charges against me of unfair hiring practices.

. . . .

[The Union was] using [the videotape] as an entrapment device to get me to say something wrong. . . . If I'd say [I would not hire union electricians], I would have had an unfair labor charge against me that they had backed up on tape. . . . That's what their idea is, is to try to hurt me.

. . . .

The Union, it's been trying to hurt me financially. They've been doing this since '88. . . . I pulled out of the Union in 1988 when the Union used extortion against my company to sign what I felt was an unfair labor agreement.

. . . .

I've spent so far almost \$10,000 fighting . . . unsubstantiated charges. . . . I would not have been in this position if they hadn't done this. They are not picking on my competitors. They are picking on me because I was an ex-union member. And that is their intent to punish [an] ex-union member.

John Braun's discussion with the court belies the Respondent's argument that the lawsuit against Kane had no retaliatory motive and was not based on activity protected by the Act. Assertions that the Union was using the videotaping as an entrapment device "to get me to say something wrong," which would allow the Union to "bring charges against me" that would be "backed up on tape" are not the statements of someone simply concerned about an invasion of privacy. Rather, they indicate that he was aware of and was reacting to the Union's attempt to organize and its filing of unfair labor practice charges. As discussed above, that activity was protected by the Act. John Braun, however, regarded the Union's attempt to organize his work force as "hurting" him financially, "picking on" him, placing him in an undesirable position, and "punishing" him. The evidence shows that it was the Union's attempt to organize the work force and not the videotaping itself which upset Respondent's agent and caused him to sue.

We find that these statements by John Braun in the small claims proceeding are an explicit admission that he threatened to initiate, initiated, and maintained the lawsuit in retaliation for protected activity.⁵ See *Summitville Tiles*, 300 NLRB 64, 65 (1990); *LP Enterprises*, 314 NLRB 580, 587 (1994). See also *Tualatin Electric*, 319 NLRB 1237 (1995), not reported in Board volumes (testimony about belief that union engaged in organized crime and that it was out to destroy witness' company was evidence of witness' antiunion sentiment). Because we have also found that John Braun's acts are attributable to the Respondent, we conclude that, under the test in *Bill Johnson's*, supra, a violation of Section 8(a)(1) of the Act has been established.

CONCLUSION OF LAW

By threatening to initiate, initiating, and maintaining a lawsuit against Danny Kane in small claims court in retaliation for protected activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to reimburse Kane and the Union for all legal and other expenses incurred in defending against the lawsuit John Braun filed in small claims court, including the appeal and the trial de novo in superior court, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991), enf'd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

ORDER

The National Labor Relations Board orders that the Respondent, Braun Electric Company, Inc., Taft, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to initiate, initiating, and maintaining baseless lawsuits against employees and the International Brotherhood of Electrical Workers, Local

⁵ The Respondent's argument that the Board cannot find the lawsuit retaliatory because the small claims court found in John Braun's favor is without merit. Once a lawsuit has been finally adjudicated and the plaintiff has not prevailed, the lawsuit is deemed meritless. *Alberici Construction*, supra. The final adjudication of John Braun's lawsuit by the superior court was in favor of Kane and the Union. Clearly, therefore, the small claims court judgment in John Braun's favor cannot be dispositive on the question of retaliatory motive.

Union No. 428, AFL-CIO in retaliation for protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse Danny Kane and the Union for all legal and other expenses incurred in defending against the Respondent's small claims court lawsuit (No. SJ3614), including the appeal and the trial de novo in superior court, in the manner set forth in the remedy section.

(b) Within 14 days after service by the Region, post at its Taft, California facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 18, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to initiate, initiate, and/or maintain baseless lawsuits against employees and the International Brotherhood of Electrical Workers, Local Union No. 428, AFL-CIO in retaliation for protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse Danny Kane and the Union for all legal and other expenses incurred in defending against our small claims court lawsuit (No. SJ3614), including the appeal and the trial de novo in superior court, with interest.

BRAUN ELECTRIC COMPANY, INC.